**STATE OF VERMONT**
**BOARD OF MEDICAL PRACTICE**

| | | | |
|---|---|---|---|
| In Re: | ) | MPC 15-0203 | MPC 110-0803 |
| | ) | MPC 208-1003 | MPC 163-0803 |
| | ) | MPC 148-0803 | MPC 126-0803 |
| | ) | MPC 106-0803 | MPC 209-1003 |
| David S. Chase | ) | MPC 140-0803 | MPC 89-0703 |
| | ) | MPC 122-0803 | MPC 90-0703 |
| Respondent | ) | | MPC 87-0703 |

## MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR STAY

On the eve of a hearing on the merits in the above-captioned proceedings, Respondent seeks a stay of those proceedings premised on the Respondent's belief that an indictment in federal court proceedings is imminent. Respondent asserts three types of arguments in support of his motion. Respondent argues that holding the Board hearing while there exists the possibility of a criminal prosecution will violate Respondent's constitutional rights to protection from self-incrimination and to a speedy trial. Respondent also advances the equitable argument that forcing Respondent to hearing in the Board matter will provide federal prosecutors with information regarding Respondent's that will compromise his defense in the criminal prosecution. Finally, Respondent argues that policy considerations-such as efficient use of Board resources and consideration of convenience to witnesses-support the granting of the stay. The State opposes the Respondent's motion at this time for the reasons set forth below.

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Under any circumstances, the constitutional and equitable arguments advanced by Respondent do not support the Respondent's request for a motion. On the other hand, the policy arguments propounded by Respondent would be valid considerations if an indictment were handed down. Respondent is correct that the State would not oppose his motion for stay for if an indictment were a certainty instead of a possibility. The State would forego opposition to the State for many of the policy reasons outlined by Respondent. Of special concern to the State would be the burden to the State's witnesses of going through duplicate hearings. However, in the absence of an actual indictment, the State must oppose the Respondent's motion at this time.

## I. THE BOARD HEARING WILL NOT VIOLATE EITHER REPSONDENT'S RIGHT AGAINST SELF-INCRIMINATION OR HIS RIGHT TOA SPEEDY TRIAL .

### A. Though Board Proceeding Forces Respondent To Make A Difficult Choice Regarding Right Against Self-Incrimination, Such A Dilemma Does Not Result In Violation Of The Right Warranting The Grant Of A Stay.

Respondent asserts that a stay is necessary in order that he protect his Fifth Amendment right against self-incrimination. Respondent argues that if the Board hearing goes forward he will be faced with the dilemma of either waiving his Fifth Amendment right against self-incrimination or invoking his Fifth Amendment right at hearing and allowing the Board to draw negative inferences from that invocation. Though the choice Respondent faces is a difficult one, Due Process does not compel the Board to grant the Respondent's request for a stay in order to resolve his difficult choice.

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In his memorandum, Respondent relies on authority that involves SEC proceedings and civil forfeiture. However, more pertinent case law does not support the Respondent's position. For example, in *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977)(attached), a Massachusetts physician faced a decision similar to that faced by Respondent in the instant case. The physician was charged with writing illegal prescriptions and the Massachusetts Board of Registration and Discipline in Medicine instituted disciplinary proceedings based on the charges. *Arthurs v. Stern*, 560 F.2d at 478. The physician moved that the disciplinary proceedings be continued until after disposition of the criminal charges. Id. The Board denied the motion based on a Massachusetts statute that specifically prohibited the type of continuance sought by the physician.

The physician then brought suit in federal court to enjoin the disciplinary proceedings. *Arthurs*, at 478. The physician argued that the Board's failure to grant the continuance coerced him to waive his Fifth Amendment right against self-incrimination. The physician argued that if he invoked the privilege in the Board proceeding, the Board would draw negative inferences from the invocation. However, if the physician did not invoke the privilege against self-incrimination, he risked supplying potentially damaging information to the prosecution in the criminal case. In reversing the District Court's grant of the injunction the First Circuit Court of Appeals stated the following:

> Given the strong public interest in promptly disciplining errant physicians taken as a class, we see no reason to hold that the board was or is constitutionally required to

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> stay its proceedings until the criminal prosecutions against any particular doctor were over.

*Arthurs v. Stern*, 560 F.2d at 479 (citations omitted).

While it is not entirely clear from the *Arthurs* case , it appears that the physician in that case was not under a Board order not to practice, as the Respondent is in this case. However, in *Malave .v Dept. of Health*, 2004 WL 1905731 (Fl. 5 App. Dist., August 27, 2004) (attached), a Florida District Court of Appeals upheld the decision of an Administrative Law Judge denying a continuance requested by a physician who was under emergency suspension. The Court noted that there was "no absolute right to a continuance of an administrative proceeding pending the outcome of parallel proceedings." *Malave,* 2004 WL at *2. The Court went on to note that while "reasonable judges could certainly disagree about the ALJ's decision to deny [the]continuance ...it cannot be said that the ALJ abused her discretion." Id. (citations omitted).

The well-reasoned decisions of *Arthurs* and *Malave* demonstrate that going forward with the Board proceeding will not violate Respondent's Fifth Amendment right against self-incrimination and Respondent's motion for stay on this basis must be denied.

B. The Board Hearing Does Not Violate Respondent's Right To A Speedy Trial.

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Respondent also argues that forcing him to defend himself in the Board proceeding and the criminal proceeding at the same time violates his Sixth Amendment right to a speedy trial. The right to a speedy trial is personal to the

defendant in a criminal proceeding and he may waive the right. *State v. Rushford*, 127 Vt. 105, 110 (1968). As with his right against self-incrimination, the Respondent may need to balance his right to a speedy trial against the time needed to prepare for trial. However, that the Board hearing is a factor in that decision does not mean that the Board hearing constitutes a violation of the Respondent's right to a speedy trial nor has Respondent offered any authority for such an argument.

## II. FACT THAT PROCESUTION MAY GAIN ADVANTAGE IF BOARD HEARING GOES FORWARD DOES NOT REQUIRE A STAY OF BOARD PROCEEDINGS.

Respondent also argues that the Board proceedings will provide prosecutors with an unfair advantage and therefore such proceedings must be stayed. This argument is, at best, disingenuous for a three reasons. First, by conducting this case in the manner he has chosen, Respondent has already telegraphed aspects of his defense to the State in these proceedings and necessarily to the prosecution in the criminal case. Respondent had to know that, in the absence of any prohibition to such conduct, the AAG involved in these proceedings would share information with the AAG involved in the criminal investigation.[1]

Second, Respondent has gained an advantage in the criminal case as a result of the Board proceedings and cannot be heard now to complain that the

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[1] Because of the restrictions on discussing grand jury proceedings alluded to by Respondent, the AAG in the criminal case could not share information with the AAG in these proceedings.

prosecution might gain a similar advantage as a result of the Board hearing going forward. As noted by respondent in his memorandum, discovery is limited in federal criminal proceedings. Respondent would not have had the opportunity before a criminal trial to depose at length persons who gave evidence to the prosecution in the criminal investigation. However, because of the Board proceedings, Respondent has had the benefit of conducting more thorough discovery in the preparation of his defense in the criminal case than he would have had normally.

Finally, the mere fact that the prosecution might gain an advantage as a result of the Board hearing going forward does not warrant a stay. Certainly, if Respondent chose to testify at the Board hearing that would provide the prosecution with an advantage. Yet, as the case law demonstrates, such advantage does not require the imposition of a stay of the Board proceedings. The potential advantage the prosecution may obtain from the Board proceedings going forward is not a proper basis for the issuance of a stay. If that were the case, the Board would always have to defer to a criminal prosecution when such parallel proceedings arose. The Board must deny the motion for stay on the equitable argument advanced by Respondent.

## III. THOUGH RESPONDENT'S POLICY ARGUMENTS FOR STAY ARE VALID CONSIDERATIONS, THEY ARE NOT A PROPER BASES FOR STAY IN THE ABSENCE OF AN ACTUAL INDICTMENT.

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While the State contends wholeheartedly with the constitutional and equitable arguments for a stay advance by the Respondent, the State would concede

that the policy considerations proffered by Respondent would be valid considerations if an indictment were a reality instead of a theoretical possibility. The State cannot say that Respondent's assessment that an indictment is imminent is necessarily wrong. However, the State also cannot confirm that the indictment is imminent. Given the uncertainty of the status of the indictment, the State must oppose a stay on the policy grounds argued by Respondent.

As a matter of policy, it is not appropriate for the Board (or any licensing body) to hold matters in abeyance on the possibility that some event may occur. If Respondent had filed this motion for stay six months ago, the State would have opposed the motion on the basis that the possibility of indictment was conjecture. In the State's view, the indictment is till a matter of conjecture. The interaction between the USAO and Respondent on which Respondent basis his assessment that an indictment is imminent could alternatively be interpreted as USAO simply stating that an indictment is not going to occur on the basis of some prearranged schedule. In other words, the indictment could happen next week, next month, or not at all. Given the lack of certitude the Stat has no alternative but to oppose the motion for stay, even for the valid policy considerations advanced by Respondent.

If an indictment were handed down, the State would not oppose a stay for the policy reasons argued by Respondent. Weighing especially heavily in the State's reasoning if an indictment were present is the burden to the witnesses of presenting testimony in two proceedings and the fact that there is in place an order prohibiting Respondent from practicing which protects the public. If a criminal prosecution

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were a reality it would almost certainly aid the Board in resolving this matter efficiently, with minimum burden to witnesses and, in the meantime, protecting the public. In the absence of an indictment, the State opposes the motion for stay on the policy grounds set forth by Respondent.

## IV. IF THE BOARD DOES GRANT THE STAY THE STATE REQUESTS SUCH STAY INCLUDE IMPORTANT PROVISIONS.

Should the Board grant the Respondent's request, the State asks that the following provisions be included in the order:

1. Periodic review of the status of the criminal proceeding (should it be instituted) and consideration as to how the Board proceedings should progress;
2. Emphasis in the order granting the stay that the public is protected by the Board's previous order prohibiting Respondent from practicing and that enforcement of the previous order is not precluded by the stay;
3. The stay is applicable to both Respondent and the State, the stay of the hearing means the stay of discovery as well.

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For reasons argued above, the Respondent's motion to stay must be **DENIED.**

Dated at Montpelier, Vermont this 15th day of September, 2004.

**WILLIAM SORRELL**
**ATTORNEY GENERAL**
**STATE OF VERMONT**
**BY**

Joseph L. Winn
Assistant Attorney General

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560 F.2d 477

United States Court of Appeals,
First Circuit.
Alexander T. ARTHURS, Plaintiff, Appellee,
v.
Chris O. STERN et al., Defendants, Appellants.
No. 77-1122.
Argued June 6, 1977.
Decided Aug. 16, 1977.
As Amended on Denial of Rehearing Sept. 23, 1977.

A physician accused of writing illegal prescriptions brought an action in federal district court to require that a state disciplinary board suspend disciplinary proceedings against him until criminal charges arising out of such activities were disposed of. The United States District Court for the District of Massachusetts, 427 F.Supp. 425, Joseph L. Tauro, J., enjoined the disciplinary board from refusing a continuance, and an appeal was taken. The Court of Appeals, Coffin, Chief Judge, held that self-incrimination principles did not require that the disciplinary proceedings be stayed. Reversed.

West Headnotes

KeyCite Notes

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk214 Disciplinary Proceedings
198Hk215 k. In General. Most Cited Cases
(Formerly 299k11.3(1) Physicians and Surgeons)

Physician accused of writing illegal prescriptions was not entitled, by virtue of his right to be free of coerced self-incrimination, to continuance of disciplinary proceedings until criminal charges arising out of such conduct were disposed of. M.G.L.A. c. 112 § 63; U.S.C.A.Const. Amend. 5.

***477** S. Stephen Rosenfeld, Asst. Atty. Gen., with whom Francis X. Bellotti, Atty. Gen., Steven A. Rusconi and Garrick F. Cole, Asst. Attys. Gen., Boston, Mass., were on brief, for defendants, appellants.
David Berman, Medford, Massachusetts, for plaintiff, appellee.

Before COFFIN, Chief Judge, CAMPBELL, Circuit Judge, CAFFREY,[FN*] District Judge.

FN* Of the District of Massachusetts, sitting by designation.

***478** COFFIN, Chief Judge.
The plaintiff-appellee is a physician accused of writing illegal prescriptions. As a result of the charges, disciplinary proceedings were begun before the Board of Registration and Discipline in Medicine of the Commonwealth of Massachusetts. A criminal investigation was also begun, and indictments were handed down. When the disciplinary hearing began, the plaintiff requested that proceedings be continued until after disposition of the criminal charges. The hearing officer refused, pointing to a state statute (s 63) that forbids continuances of that sort.[FN1]

FN1. "Said boards shall not defer action upon any charge before them until the conviction of the person accused . . .." Mass.Gen. Laws, ch. 112, s 63.

The plaintiff then brought this suit in federal district court. He pointed out that the disciplinary board would draw an adverse inference from his silence if he invoked his privilege against self-incrimination at the hearing. The threat of losing his license, he argued, would force him to testify, thus revealing his criminal defenses and making statements that might be used against him in the criminal trial. The district court, relying on the Fifth Amendment's privilege against self-incrimination and general notions of due process, enjoined the disciplinary board from using s 63 as a reason for refusing the plaintiff a continuance. The present appeal followed. After the appeal, but before this opinion issued, one set of criminal charges went to trial. Plaintiff testified at his trial and was acquitted. Other charges are pending, and the board has not attempted to go forward with its proceedings.
This case can be resolved on the merits [FN2] by reference to settled law. The board is not constitutionally forbidden from drawing an adverse inference if a doctor refuses to testify at a disciplinary hearing. The board is not conducting a criminal trial, and civil proceedings are governed by a different set of Fifth Amendment principles. In civil cases, the state may not force incriminating testimony from a citizen by threatening penalties or automatic unfavorable judgments. See, e. g., Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). But this principle does not control when the only consequence of silence is the danger that the trier of fact will treat silence as evidence of guilt.[FN3] The distinction is drawn in Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), which held that a prison disciplinary board may give weight to an accused inmate's silence when he stands mute for fear of a related criminal prosecution. The Baxter Court stated the principle broadly: the Fifth Amendment does not bar an adverse inference "where the privilege is claimed by a party to a civil cause." Id. at 318, 96 S.Ct. at 1558. We think it applies as forcefully in medical discipline cases as it does in prison discipline cases. The appellee's assertion that doctors have a stronger liberty and property interest in continuing their practice than prisoners have in avoiding discipline is not very persuasive. Moreover, while such distinctions may have a place in a procedural or substantive due process case, they are not relevant to Fifth Amendment analysis. Cf. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

> FN2. On appeal, for the first time, the board urges several other grounds for reversal. We are reluctant to consider them at this late date.
>
> Because we reverse on the merits, we need not decide whether these belated arguments were properly before us.

> FN3. The Commonwealth has stated in its brief (p. 42) that "The Board's ultimate decision could not be based solely upon an adverse inference drawn from (the doctor's) presumed refusal to testify . . . (S)uch a determination would lack substantial evidence and be subject to sure invalidation upon judicial review."

Nor is there anything inherently repugnant to due process in requiring the doctor to choose between giving testimony at the disciplinary hearing, a course that may help the criminal prosecutors, and keeping silent, ***479** a course that may lead to the loss of his license. The doctor's due process argument rests in part on the claim that the threat of an adverse inference unfairly forces him to reveal his criminal defense in advance of trial. He has some case support for his proposition. Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873 (1955).[FN4] To the extent that this argument rests on the broad ground that parties with something to lose in a proceeding may never be forced to make this choice, it is answered by United States v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). In Kordel, the FDA began an in rem action against two products sold by a corporation whose officers were in serious danger of criminal prosecutions related to the products. The officers argued that it violated due process to hold the civil proceeding, with its attendant discovery, before the criminal trial. This the Court emphatically and unanimously denied:

FN4. A related argument is that the threat of subsequent criminal proceedings unfairly forces him to remain silent and thus constitutes an unconstitutional restriction on the evidence the board accepts. Cf. Bowman Trans., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n. 4, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). We see no merit in this claim. See generally Flint v. Mullin, 499 F.2d 100 (1st Cir. 1974). The cases on which appellee apparently relies on are inapposite; they deal with the limits of judicial notice and rest on notions of unfair surprise. See, e. g., Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

"The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as FDA invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." Id. at 11,[FN5] 90 S.Ct. at 769.

FN5. The Kordel Court found no particular facts requiring a different result in that case. Nor do we find such facts here. The disciplinary proceeding was not brought solely to obtain evidence for the criminal prosecution; the doctor was aware during the hearing of the pending criminal actions; the doctor had counsel; and the doctor does not claim a danger of adverse publicity or any other special circumstances. See Kordel, supra, 397 U.S. at 11-12, 90 S.Ct. 763.

The defendants in Kordel raised one hypothetical that disturbed the Court. Suppose, they argued, no officer could answer the civil interrogatories without incriminating himself. The Court responded that "(f)or present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until after termination of the criminal action." Id. at 9, 90 S.Ct. at 768.
The doctor seizes on this cautiously tentative language, arguing that the Fifth Amendment may require the board to stay its proceedings until the criminal action ends. We disagree. Whatever suggestion that such an order is compelled might be read into this dictum would seem to be negated by the later decision in Baxter v. Palmigiano, supra. Indeed, the discussion in Kordel regarding protective orders is limited to the unique context in which corporate officers might be prevented from exercising their Fifth Amendment privilege because to do so would unacceptably extend the constitutional protection to the corporation which employed them. This is totally inapposite to the case before us. The remainder of the Kordel opinion is simply a recognition of the power of federal courts, after a balancing of interests in the particular case before them, to stay civil suits because of pending criminal charges. See, e. g., Gordon v. FDIC, 138 U.S.App.D.C. 308, 427 F.2d 578 (1968). The denial is ***480*** reviewed simply for abuse of discretion. See Iannelli v. Long, 487 F.2d 317 (3d Cir. 1973); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973). Given the strong public interest in promptly disciplining errant physicians taken as a class, we see no reason to hold that the board was or could be constitutionally required to stay its proceedings until the criminal prosecutions against any particular doctor were over[FN6]. De Vita v. Sills, 422 F.2d 1172 (3d Cir. 1970); United States v. Sloan, 388 F.Supp. 1062 (S.D.N.Y.1975); Keene v. Rodgers, 316 F.Supp. 217, 221 n. 4 (D.Me.1970).

FN6. The district court took the view that s 63 impermissibly restricted the board's discretion to grant a continuance. We have concluded that the constitution does not require a stay in this case; we need not ask whether s 63 can be constitutionally applied

in all cases. The statute is constitutional as applied, and we see no reason to create a variant of "overbreadth" analysis for cases of this sort.

Reversed.
C.A.Mass. 1977.
Arthurs v. Stern,
560 F.2d 477
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2004 WL 1905731
--- So.2d ---
**(Cite as: 2004 WL 1905731 (Fla.App. 5 Dist.))**





District Court of Appeal of Florida,
Fifth District.

Ronald MALAVE, Appellant,
v.
DEPARTMENT OF HEALTH, Board of Medicine, Appellee.

**No. 5D02-3705.**

Aug. 27, 2004.

**Background:** Doctor sought review of final decision of Department of Health, Board of Medicine, revoking his license to practice medicine.

**Holdings:** The District Court of Appeal, Orfinger, J., held that:
(1) administrative law judge (ALJ) was under no obligation to grant doctor's request for continuance in order for doctor to avoid having to testify so as to preserve his privilege against self-incrimination pending outcome of parallel criminal proceedings, and
(2) that ALJ reopened administrative proceeding for limited purpose of allowing doctor to present his testimony at conclusion of parallel criminal proceeding did not mean that doctor could present other witnesses and evidence at reconvened hearing.

Affirmed.

**[1] Health ⚿219**
198Hk219 Most Cited Cases

Administrative law judge (ALJ) was under no obligation to grant doctor's request for continuance in license-to-practice revocation hearing, in order for doctor to avoid having to testify so as to preserve his privilege against self-incrimination pending outcome of parallel criminal proceedings; ALJ ultimately allowed doctor to reopen administrative proceeding for limited purpose of putting on his testimony following conclusion of criminal trial. U.S.C.A. Const.Amend. 5; West's F.S.A. § 458.331(1)(j, t, x).

**[2] Administrative Law and Procedure ⚿468**
15Ak468 Most Cited Cases

The decision to grant or deny a continuance in an administrative proceeding is a matter in the sound discretion of the administrative law judge (ALJ).

**[3] Administrative Law and Procedure ⚿468**
15Ak468 Most Cited Cases

There is no absolute right to a continuance of an administrative proceeding pending the outcome of parallel criminal proceedings.

**[4] Health ⚿218**
198Hk218 Most Cited Cases

That administrative law judge (ALJ) reopened administrative license-to-practice revocation proceeding for limited purpose of allowing doctor to present his testimony at conclusion of parallel criminal proceeding did not mean that doctor could present other witnesses and evidence at reconvened hearing, where, although doctor elected not to testify during original hearing pending outcome of criminal trial for purpose of preserving his privilege against self-incrimination, other witnesses could have testified at original hearing without jeopardizing the privilege. U.S.C.A. Const.Amend. 5 ; West's F.S.A. § 458.331(1)(j, t, x).
Administrative Appeal from the Department of Health, Board of Medicine.

Ronald Malave, Coto Laurel, Puerto Rico, Pro Se.

Pamela H. Page, Department of Health, Tallahassee, for Appellee.

ORFINGER, J.

***1** Ronald Malave, a medical doctor, appeals a final order of the Board of Medicine (Board) revoking his license to practice. Dr. Malave, a psychiatrist, treated J.P. for about five years for multiple personality disorder and schizophrenia. After J.P. complained that Dr. Malave had engaged in sexual activity with her, the Department of Health (Department) suspended his license to practice medicine on an emergency basis. Subsequently, the Department filed an administrative complaint seeking to revoke his license, alleging that Dr. Malave had violated (1) section 458.331(1)(j), Florida Statutes (2002), by exercising influence in a patient-physician relationship for purposes of engaging a patient, J .P., in sexual activity; (2) section 458.331(1)(x) by violating the provisions of chapter 458, Florida Statutes (2002), which prohibit sexual misconduct; and (3) section 458.331(1)(t), Florida Statutes (2002), by failing to practice medicine with that level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

About the same time the administrative complaint was filed, the State instituted criminal proceedings against Dr. Malave arising from his treatment of J.P. On appeal, Dr. Malave contends that the administrative law judge (ALJ) abused her discretion when she refused his third request for a continuance of the final administrative hearing pending resolution of the criminal case, and further abused her discretion when, following the conclusion of the criminal case, she allowed Dr. Malave to reopen the administrative proceeding solely for the purpose of presenting his testimony, but refused to allow him to present evidence in support of his defense. Concluding that the ALJ did not abuse her discretion, we affirm.

[1] Our review of the Board's order, accepting and adopting the ALJ's findings of fact and conclusions of law, is governed by section 120.68, Florida Statutes (2002). *See Legal Envtl. Assistance Found. v. Clark,* 668 So.2d 982 (Fla.1996). A reviewing court may set aside agency action only when it finds that the action is dependent on findings of fact that are not supported by substantial competent evidence in the record, material errors in procedure, incorrect interpretations of law, or an abuse of discretion. § 120.68(7), Fla. Stat. (2002). When factual findings are reviewed, the court must not substitute its judgment for that of the agency in assessing the weight of the evidence or resolving disputed issues of fact. *See* § 120.68(10), Fla. Stat. (2002).

Dr. Malave sought his third continuance of the administrative hearing because of his reluctance to testify while the criminal matter was pending due to his Fifth Amendment privilege. The ALJ denied Dr. Malave's third request for a continuance, and the administrative hearing took place with Dr. Malave and his attorney present. Dr. Malave chose not to testify or call witnesses at the hearing.

***2** [2][3] The decision to grant or deny a continuance in an administrative proceeding is a matter in the sound discretion of the administrative law judge. *See City of Palm Bay v. State, Dep't of Transp.,* 588 So.2d 624, 628 (Fla. 1st DCA 1991). There is no absolute right to a continuance of an administrative proceeding pending the outcome of parallel criminal proceedings. *See, e.g., United States v. Kordel,* 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970). Indeed, many courts have determined that it does not offend due process to give the parties subject to disciplinary hearings the choice between giving testimony at a disciplinary proceeding or remaining silent, when there is a strong public interest in disciplining the licensed professional or public employee. *See, e. g.,* ***Arthurs v. Stern,* 560 F.2d 477 (1st Cir.**1977); *Giampa v. Ill. Civil Serv. Comm'n,* 89 Ill.App.3d 606, 44 Ill.Dec. 744, 411 N.E.2d 1110 (Ill.App.Ct.1980). Conversely, other courts utilize a balancing test in which they weigh the petitioner's interest in expeditious resolution of the administrative disciplinary action against the burden imposed on the respondent by being forced to answer to those claims before the criminal proceedings are complete. *See, e.g., Advanced Power Sys. v. Hi-Tech Sys., Inc.,* 148 F.R.D. 138, 139

(E.D.Pa.1993); *United States v. One Parcel of Real Estate Located at 12525 Palm Road,* 731 F.Supp. 1057 (S.D.Fla.1990).

Here, Dr. Malave forcefully argues that the ALJ abused her discretion when she denied his requested continuance, particularly when he posed no threat to the public given the emergency suspension of his medical license. While reasonable judges could certainly disagree about the propriety of the ALJ's decision to deny Dr. Malave's continuance, we cannot say that no reasonable judge would have taken the position adopted by the ALJ. That being the case, it cannot be said that the ALJ abused her discretion. *Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla.1980).

[4] Similarly, we cannot say that the ALJ abused her discretion when, after the administrative hearing had concluded and the criminal trial resulted in Dr. Malave's acquittal, the ALJ allowed Dr. Malave to reopen the administrative proceeding for the limited purpose of putting on his testimony since, following his acquittal on the criminal charges, he no longer had any Fifth Amendment concerns. Dr. Malave also sought to put on other witnesses and present other evidence at the reconvened hearing. However, the ALJ ruled that because those witnesses could have been put on at the original hearing without any Fifth Amendment concerns, Dr. Malave's failure to call witnesses or put on evidence waived his right to do so. That decision was within the discretion of the ALJ.

AFFIRMED.

PLEUS and PALMER, JJ., concur.

2004 WL 1905731 (Fla.App. 5 Dist.)

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